STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable Cooper, P.J., and Griffin and Borrello, J.J.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

Supreme Court
No. 126538

MARIO CURVAN,

Defendant-Appellee.

Court of Appeals No. 242376
Lower Court No. 01-010083-01

The People's Brief on Appeal
on Leave Granted
Oral Argument Requested

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Statement of Jurisdiction

This Court granted the People's Application for Leave to Appeal by Order of November 4, 2004.

Statement of Question Involved

Whether the question is one of successive prosecutions or multiple punishment, the definition of "same offense," that offenses are the same if each does not require proof of an element the other does not, should not vary. But whether offenses are the same or not, multiple punishment is permitted if the legislature so intended. While useful as raising a presumption on the legislative intent question, the elements test is not helpful when applied to predicate and predicate-based offenses; rather, because each statute addresses a distinct social harm, that multiple punishments were intended should be rebuttably presumed.

The People so submit.
Defendant would disagree.

Statement of Standard of Review

An appellate court's review of a double jeopardy issue is de novo. *In re Stark,* 250 Mich App 78, 80; 645 NW2d 345 (2002). Likewise, statutory interpretation, to the end of discerning legislative intent, is a question of law that is reviewed de novo. *People v Williams,* 226 Mich App 568, 570; 576 NW2d 390 (1998).

Statement of Facts

Defendant was charged in an Information in the Wayne County Circuit Court, Criminal Division, with the offenses of first-degree felony murder, in violation of MCL 750.316, and armed robbery, in violation of MCL 750.529. The matter was tried before a jury presided over by the Honorable Sean F. Cox.

Witnesses

i) Angela Wells

Angela Wells testified at trial that at about 9:00 p.m. on December 31, 1998, she, her niece, and Demarius Baldwin, her boyfriend at the time, went up to Frank's Laundromat, to get some snacks for the kids (The People's Appendix, 9a-11a). Frank's Laundromat had been in the neighborhood as long as she had lived there (10a). Frank stocked pretzels and candy for the kids (10a). Frank was the type of person who helped anyone in need; he'd loan money to people in the neighborhood and they would pay him back (11a). When she, her niece, and Baldwin went up to Frank's on December 31st, they knocked on the door (11a). She saw that Frank's dog was on the couch, as opposed to being in the back, where the dog usually stayed (11a-12a). After knocking for five minutes, she told Baldwin to pull on the door to see if it was open; it was (12a). This was unusual because Frank never left his door unlocked at that time of night (12a). They walked through the laundromat, looking for Frank (12a). Baldwin finally found Frank in the back (12a). Baldwin told her not to go back there, because Frank was lying on the floor in a puddle of blood; Baldwin told her to call the police, which she did, from a phone booth on the corner (12a-13a). After she called 911, she took her niece back to her mother's and then went back to Frank's (13a).

By the time she got back to Frank's, the police were there (13a). She heard Baldwin tell the police that Frank had a screwdriver stuck in his neck (13a).

ii) Detroit Police Officer Brian Johnson

Detroit Police Officer Brian Johnson testified that at 9:00 p.m. on December 31, 1998, he and his partner received a radio run to a business establishment at 6220 Georgia in Detroit; the report was of a felonious assault (Appendix, supra, 15a-16a). When they arrived at the location, they found a man lying on the floor with a screwdriver impaled in his neck (16a). The person who had called the report in, a Mr. Baldwin, and a young woman were at the scene (17a-18a). He also observed that the cash register was open and that there were only coins, no paper currency, in the cash register (18a). An ambulance was en route and other police officers, homicide officers and evidence technicians, arrived on the scene (18a-19a).

iii) Detroit Police Officer Tracey Burgess

Detroit Police Officer Tracey Burgess testified that in the later hours of December 31, 1998 or the early morning hours of January 1, 1999, she was dispatched to Detroit Receiving Hospital to pick up a screwdriver (Appendix, supra, 21a). She took the screwdriver back to the precinct where it was placed on an evidence tag (22a). She identified People's Exhibit No. 17 as the screwdriver she picked up from the hospital (21a-22a).

iv) Detroit Police Evidence Technician Michael Carpenter

Detroit Police Evidence Technician Michael Carpenter testified that his duties included documenting crime scenes; he was also assigned to the laser lab on a rotating basis (Appendix, supra, 23a). What the laser lab did was to look for latent fingerprints on items using chemicals and laser, which was an alternative light source (23a). It was not always possible to find a fingerprint on an

object that had been handled; the texture of the object sometimes prevented the detection of a fingerprint (24a). He was handed People's Exhibit No. 17 (the screwdriver) and asked if it would be possible to find a fingerprint on the handle of it; he responded that it would be very difficult because the handle did not have smooth surfaces, but rather, had a lot of bumps and ridges (25a).

He was also handed People's Exhibit No. 23, which was a hammer on evidence tag 687936 (25a). He had received this object previously and was asked to search for fingerprints on it (25a-26a). He found no usable fingerprints on the hammer (26a). He explained that what could cause fingerprints to be removed could be the weather or being thrown in a tool box or being rubbed up against something, like a carpet (27a).

v) Mark Bono

Mark Bono testified that Frank Bono, the deceased, was his father (Appendix, supra, 29a). The last time he saw his father alive was a few days before New Years Eve of 1998 (30a). On the night of New Year's Eve, at around 10:00 p.m., he received a call from a police officer that something had happened at his father's laundromat and asking him to come down there (30a). By the time he got there, his father had been taken to Detroit Receiving Hospital (30a). He went to the hospital, but did not see his father immediately because his father was in surgery, having the screwdriver removed and having surgery on his brain (30a-31a). He did see his father after the surgery (31a). His father lived for three months but was in a coma due to severe brain damage (31a). His father finally died on March 20 (31a).

vi) Detroit Police Evidence Technician Sergeant David Babcock

Detroit Police Evidence Technician Sergeant David Babcock testified that he responded to the crime scene in this case sometime after 11:00 p.m. on December 31, 1998 (Appendix, supra, 33a). He took photographs and made a sketch of the scene (33a).

On cross-examination, Sgt. Babcock testified that he did see evidence of a struggle in the office of the building where the crime had occurred (36a). Although the overall condition of the building was quite messy, there was a blood colored substance on the floor and on several of the walls of the small office (36a).

vii) Deputy Chief Wayne County Medical Examiner Carl Schmidt

Deputy Chief Wayne County Medical Examiner Carl Schmidt testified that according to the records kept by the Wayne County Medical Examiner's Office, Frank Bono died from blunt force trauma to his head and the complications from that (Appendix, supra, 40a-41a). What he meant by complications was that the trauma to the head was so severe and impaired his ability to function so profoundly that the deceased suffered complications as a result (41a). The immediate result of the trauma was that the deceased was comatose, and could never breath on his own again or feed himself (44a). Consequently, a tracheotomy was done so that a ventilator could be applied and a feeding tube was put into the deceased's stomach (44a). But for the trauma, these other events would not have occurred (45a). The deceased's death was classified as a homicide, meaning that the death was the result of another person's actions (42a).

viii) Detroit Police Investigator Andrew Sims

Detroit Police Investigator Andrew Sims testified that on August 21, 2001, he came into contact with Defendant relative to the robbery and death of Frank Bono (Appendix, supra, 47a-48a).

Defendant had been brought over to him by the Homicide Unit (49a-50a). After advising Defendant of his constitutional rights, he took a verbal statement from Defendant, in which Defendant told him that he and his friend Abdullah had talked about robbing Frank Bono in the laundromat (52a). Defendant told him that he and Abdullah both went inside the laundromat, and, once inside, Abdullah stuck Frank Bono in the neck and took some money; he (Defendant) ended up getting $15 (52a). After Defendant gave him this verbal statement, he had Defendant write out a statement in his own handwriting, which went as follows:

> I saw Abdullah. I went in to stick up Frank. I saw Abdullah beat him and stick him with a screwdriver. Took his money. He gave me $15.
>
> (52a).

This statement was written by Defendant and then signed by him at 9:25 p.m. (52a). He asked Defendant if the statement was true; Defendant responded in the affirmative (52a). He then brought in the detective who had brought Defendant in and asked Defendant again, in front of the detective, if the statement was true; Defendant said that it was (52a-53a).

ix) Detroit Police Investigator Ramon Childs

Detroit Police Investigator Ramon Childs testified that this case came to the attention of the Operation Second Shot, which had as its purpose the solving of cold homicide cases, a couple of days before Defendant was arrested (Appendix, supra, 54a-57a). The case came to the attention of Second Shot based on a tip (57a). The justification for Defendant's arrest was that there was a warrant out for Defendant's arrest; Defendant was an illegal alien (58a). He did not, however,

suspect Defendant of being involved in the robbery and murder of Frank Bono (58a-59a). He did believe that Defendant had information about the case (59a).

When Defendant was brought to the Homicide Section, Special Agent Meiser advised Defendant of his constitutional rights (59a). It was Meiser who talked to Defendant initially (59a-60a). Meiser then came and told him what Defendant had said and how what Defendant had said did not make sense (60a). He and Meiser then went and talked to Defendant (60a). Defendant talked about how an individual had gone over to the place of business and had gone inside (61a-62a). What was unusual about Defendant's rendition was that he used the pronoun "we," which indicated that he was including himself (62a). After Defendant gave his rendition, the decision was made to have Defendant interviewed by another interviewer; Investigator Sims was then contacted (62a).

When he was advised that Defendant had made a written statement, he re-interviewed Defendant back at Police Headquarters, after first advising Defendant of his constitutional rights (63a). The advisement of rights took place at 9:55 p.m. on that same day, August 21, 2001 (66a). Defendant then made a verbal statement, which was reduced to writing (67a). He wrote out the statement, rather than having Defendant write it out, and Defendant signed each page of the statement (67a-68a). The statement, which was in narrative and then in question and answer format, was follows:

> The night he said he was going to do Frank. We went to the laundromat/store. We went inside. Halim had my roof hammer. Halim hit him in the head with it and stabbed him in the neck with a screwdriver. Halim took money out of the cash register. We came out the door. Halim gave me some known (sic) [money] in the alley, and we went our separate ways. I went to the mosque and Halim went his own way. Halim threw the hammer onto a building

nearby. Loukman and Abdul Maltidar gave him some money and helped him go to Cleveland and then to Boston.

Q What happened to Mr. Bono when you and Halim got to his place?

A Halim knocked on the door. He let us in. Halim hit him in the head with the hammer and stabbed him in the neck. The trachea. He knew what he was doing.

Q Did you know how many times Mr. Bono was struck?

A One time, to my knowledge.

Q What happened after he was struck?

A He fell to the ground and he stuck him.

Q What did he stick him with?

A A flat head screwdriver with a yellow handle.

Q What kind of hammer was it?

A Roofing hammer, an East Wing, silver with blue handle, 22 ounce.

Q Did you leave with Halim?

A He gave me some money and went our separate ways.

Q How much money did you get?

A $15 or $20.

Q Did he take any money off Frank?

A No. He just took money from the register.

Q What were you to do while you were with Halim?

A To look out, watch his back.

Q How do you know Halim had assistance leaving the state?

A He hooked up with Loukman from Cleveland. He, Loukman, what he had done and to Cleveland (sic). Loukman was in the jamad.

Q What is a jamad?

A Traveling Muslims, brothers visiting other brothers in other states.

Q What mosque or masjid were they visiting?

A Masjid Newer, Caniff and Alpena across from Crown Supermarket. And Masjid Four in Highland Park.

Q Do you know where Loukman went after Cleveland?

A He went back and from Cleveland and Detroit (sic).

Q Where did he have him go after his trip to Cleveland?

A To Boston, Massachusetts. That's where he has family.

Q What is Loukman's real name?

A James Bow, Big Red. Six three, about 240, 250.

Q What is Halim's full name?

A Abdullah Halim is what I know him by. That's what everyone calls [him], and that's what I saw on his I.D.

Q Describe Abdullah Maltidar.

A Old man, 72, 74 year old, five eight. 105 pounds. Dark complected. White beard, one tooth in his mouth.

He wears traditional Muslim clothing. It's - I believe it's a sarim. He stands out. His kids are Caucasian.

Q You referred in an earlier statement to Abdul. Who are you talking about?

A Abdullah Halim.

Q Before the day you went over to Frank's place, had you talked to have him about things (sic)?

A He talked to me months before about robbing Frank.

Q When he told you this plot to rob Frank, was anyone else present the night of the robbery?

A Abdullah Mailk and myself.

Q Describe Abdullah Malik.

A Black male, 38, 5-10, 160 pounds, dark complected. Long pointed beard. He stays somewhere in Southfield.

Q You talked about Halim wanted to do Frank. What are you talking about when you say do?

A Rob.

Q When he asked you about it, what was the (sic) [your] role supposed to be?

A Just to ~~look~~ out while he robbed Frank.

Q How did Halim get your hammer?

A He took the hammer out of the house.

Q Did you know he had it when you went over there?

A No.

Q Did you give him permission to use your hammer?

A No.

Q Did he say how he was going to do this robbery?

A He said he was going to go over there. And he was going to hit Frank in the head.

Q Did he say what he was going to use [as a] weapon?

A The hammer.

Q He told you this when, the night of the incident?

A The same night.

Q Before or after you went over to Frank's place?

A Before.

Q Was this while you were in the building on Mt. Elliott?

A Yeah.

(68a-73a).

The next day, he (Investigator Childs) and Agent Meiser took Defendant to the location where the hammer used to hit Frank Bono was supposed to have been thrown (75a). The address was on Richardson Street, one block east of the crime scene (75a-76a). Defendant showed them a building at that location and told them that the hammer had been thrown on top of the building (76a). Agent Meiser went up onto the roof of the building, but could not find any hammer (76a). Later, he received a call from a person who was working at that site and this person said that he found a hammer under some debris (77a). He (Childs) had left his card with the workmen at the site when he and Meiser were there looking for the hammer, and he had asked the workmen to let him know if they found any tools or anything on the roof (77a). When he got the call from the person, he told the person not to touch the hammer; he then went over and got the hammer himself (77a). The hammer was pointed out to him by the person who had called him; the hammer was on

the rear of the building on Richardson Street (77a). He put the hammer on an evidence tag and conveyed it to the station to be tested later (78a).

On cross-examination, Investigator Childs was asked if, when Defendant told him about the actual hammer wielder, any attempt was made to find this person (78a-a). Childs responded that there was (78a-a). The person had an address in Flint, which was checked out by a crew of their members, which included a state trooper, and they also asked the FBI to check out possible addresses in Boston (78a-a-78b-a). They never found another person Defendant mentioned in his statement either, that being one Malik (78b-a).

x) FBI Special Agent Michael Mizer

FBI Special Agent Michael Mizer testified that he was currently assigned to the Violent Crime Task Force (Appendix, supra, 82a). Before that, he had been assigned to Second Shot, which was a task force of federal, state, and local officers looking at cold homicide cases in Detroit (82a). The murder case of Frank Bono, which had occurred in December of 1998, was one such case (82a). They received a tip that Defendant might have information about the case (9). This was what re-activated the case (82a-83a). They pulled the case file and then ascertained Defendant's identity (83a). At the time, Defendant had an order of deportation against him, and so, Defendant was susceptible to arrest (83a-84a). Defendant was arrested and placed in custody (84a).

After he advised Defendant of his constitutional rights, he told Defendant that he wanted to talk to him about any information he had about the death of Frank Bono (84a). This happened on the fifth floor of Police Headquarters (84a). Defendant said that he knew the person who had done it and the circumstances of it (85a). He talked to Defendant for about 45 minutes and Defendant's

story kept changing and was not making sense (86a). That's when he went and got Investigator Childs to talk to Defendant (86a). Childs did talk to Defendant and then the decision was made to have Defendant talk to yet a third person, that being Andrew Sims, at the Detroit Lab (86a-87a). After Defendant gave a statement to Sims, Investigator Childs took another statement from Defendant (87a).

There then came a time that he and Investigator Childs took Defendant to a building where Defendant said the hammer used in the robbery had been thrown; Defendant told them that the hammer might be on top of the building (89a). They called the Fire Department (89a). The Fire Department brought a ladder and he went up onto the roof of the building (89a). He did not find any hammer up there at that time (90a).

Jury Instructions

The jury was instructed on the count of first-degree felony murder with the underlying felonies being armed robbery or larceny and on the count of armed robbery (Appendix, supra, 92a-107a). The jury returned a verdict of guilty as to both counts (Appendix, supra, 111a-114a).

Defendant was sentenced to life imprisonment for the felony-murder conviction and to 20 to 40 years for the armed robbery conviction.

Summary of Argument

In *People v Nutt*,[1] this Court adopted the *Blockburger*[2] "same elements" test as the test intended by the ratifiers of the 1963 Constitution to be applied for discerning the meaning of the term "same offense" for purposes of successive prosecutions. For purposes of multiple punishments, though the People submit that "same offense" should be determined by application of the same test as for successive prosecutions, the ultimate focus is not upon whether two statutes proscribe the same offense, but whether the Legislature intended there to be cumulative punishments from both statutes. The primary purpose of statutory construction is to ascertain and give effect to the Legislature's intent, and the rules of statutory construction are but a guide to that end. On the question of legislative intent, *Blockburger* is but a test of statutory construction and should only be applied if helpful to ascertaining legislative intent. It is not helpful when applied to predicate and predicate-based offenses. Rather, this Court should look to other evidence of legislative intent, in particular whether each statutes addresses a distinct social harm. An application of that principle indicates that the Legislature intended multiple punishments for the predicate-based offense of felony murder and the predicate offense of armed robbery.

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[1] *People v Nutt,* 469 Mich 565; 677 NW2d 1 (2004).

[2] *Blockburger v United States,* 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932).

Argument

Whether the question is one of successive prosecutions or multiple punishment, the definition of "same offense," that offenses are the same if each does not require proof of an element the other does not, should not vary. But whether offenses are the same or not, multiple punishment is permitted if the legislature so intended. While useful as raising a presumption on the legislative intent question, the elements test is not helpful when applied to predicate and predicate-based offenses; rather, because each statute addresses a distinct social harm, that multiple punishments were intended should be rebuttably presumed.

Preface

At the time that the People filed their Application for Leave to Appeal, they were of the opinion that this Court's decision in *People v Nutt*[3] mandated application of the *Blockburger*[4] "same elements" test to every double jeopardy context, by virtue of this Court's observation that "there is no authority . . . . for the proposition that the [Double Jeopardy Clause] has different meanings in different contexts," and that because "multiple punishments" was a component of the Double Jeopardy Clause, the *Blockburger* "same elements" test should apply to multiple punishments. On retrospect, the People believe that that the matter is far more complex, that complexity in large measure the result of a confusion in the law. The confusion results from the placement of the question of the permissibility of multiple punishments as a component of the Double Jeopardy Clause.[5]

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[3] *People v Nutt,* 469 Mich 565; 677 NW2d 1 (2004).

[4] *Blockburger v United States,* 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932).

[5] In the People's defense, it is submitted that the area of double jeopardy is one that warrants constant re-examination. Indeed, as Justice Rehnquist observed in his dissenting opinion in *Whalen v United States,* 445 US 684; 100 S Ct 1432; 63 L Ed 2d 715 (1980):

What the People will argue in the first part of their Brief on leave granted is that the issue of "multiple punishments" should not be viewed as governed by double jeopardy, for whether convictions for multiple offenses are involved when "offense" is defined, as it should be, by *Blockburger/Nutt* analysis, or for one offense when that test if employed, the question of whether multiple punishments are permitted turns on the intent of the legislature, and thus on due process. Thus, while the question of whether a single offense or multiple offenses is involved is governed by the *Blockburger/Nutt*, application of the *Blockburger/Nutt* test does not necessarily resolve the punishment question, though its application should ordinarily raise a presumption one way or the other.

Furthermore, even if "multiple punishments" is viewed as a component of double jeopardy, the same principles apply, for as Justice Boyle observed in *People v Sturgis*,[6] quoting from *People v Wakeford*,[7] "It is also clear that 'the term 'same offense' has a different and broader meaning in

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> Despite its roots in antiquity, however, this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions, including ones authored by me, are replete with *mea culpa's* occasioned by shifts in assumptions and emphasis. Compare, *e.g., United States v Jenkins*, 420 US 358; 95 S Ct 1006; 43 L Ed 2d 250 (1975), with *United States v Scott*, 437 US 82; 98 S Ct 2187; 57 L Ed 2d 65 (1978) (overruling *Jenkins*). See also *Burks v United States*, 437 US 1, 9; 98 S Ct 2141, 2146; 57 L Ed 2d 1 (1978) (Our holdings on this subject "can hardly be characterized as models of consistency and clarity").
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> 445 US at 700; 100 S Ct at 1442.

[6] *People v Sturgis,* 427 Mich 392, 399; 397 NW2d 783 (1986).

[7] *People v Wakeford,* 418 Mich 95, 104; 341 NW2d 68 (1983).

a case involving a subsequent prosecution than it does . . . . where multiple punishments [are] imposed during a single trial." Put, the People believe, more precisely, that offenses are the "same" has different ramifications in the context of successive prosecutions than in that of multiple punishments.

Introduction: The Jeopardy Clause and "Multiple Punishment"

A. Origin of the Jeopardy Clause

The Federal and State Constitutions contain nearly identical double jeopardy provisions. US Const, Am V states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb .... " Const 1963, art 1, § 15 provides: "No person shall be subject for the same offense to be twice put in jeopardy."

Given that the Fifth Amendment to the Federal Constitution provides, in terms that do not refer to multiple punishments, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...," the question arises as to the scope, if not the legitimacy, of a multiple punishments jurisprudence drawn from this fundamental text. The answers must be found in history, logic, and sound policy, for as Justice Holmes observed long ago, the scope and significance of constitutional provisions cannot be ascertained without considering "their origin and the line of their growth."[8]

The prohibition in the Federal Constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of *autrefois acquit* and *autrefois convict*. Blackstone stated that

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[8] *Gompers v United States*, 233 US 604; 34 S Ct 693; 58 L Ed 1115 (1914).

> . . . . the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.[9]

Blackstone also observed that the

> plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime. . . .[10]

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal."[11]

This tradition of the pleas in bar of *autrefois acquit* and *autrefois convict*, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists.[12] New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be

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[9] 4 Blackstone, *Commentaries,* 335. *Autrefois attaint*, or corruption of the blood, has long been obsolete.

[10] 4 Blackstone, *Commentaries* at 329-331.

[11] See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

[12] See e.g. the Massachusetts Body of Liberties of 1641.

liable to be tried, after an acquittal, for the same crime or offence."[13] Courts in other states also recognized this form of plea in bar.[14]

This rich history was thus before the First Congress which proposed the Bill of Rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause stated: "No person shall be subject, except in cases of impeachment, to *more than one punishment* or one trial for the same offence...."[15] The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial even where sought by the defendant on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment jeopardy clause, referring to one jeopardy, and with no reference to "more than one punishment."

Thus, our jeopardy clause is an amalgam of common law pleas in bar, which required an actual judgment in a prior proceeding before the bar could be effectively pled, and which had no reference to multiple punishments occurring at one proceeding, being concerned entirely with multiple proceedings. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double jeopardy clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense

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[13] NH Const, art 1, § 16 (1784).

[14] See 26 Am Crim L Rev at 1480-1481.

[15] 1 Annals of Congress 434 (emphasis added).

charged, by the *verdict of a jury, and judgment passed thereon for or against him.*[16] The historical underpinning of the jeopardy protection, then, with regard to acquittals, is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[17]

B. The Jeopardy Clause and Multiple Punishments

The notion that the jeopardy clause precludes multiple punishments began with *Ex parte Lange.*[18] The statute under which Lange was convicted authorized a maximum sentence of one year in prison, or a fine of $200, the possible penalties stated in the disjunctive; the trial judge sentenced Lange to both. Because the sentence was in excess of the statutory authorization, the Supreme Court issued a writ of habeas corpus, and *Lange* has often been cited as resting on – and establishing – a "multiple punishments" component of the jeopardy prohibition. The Court, acknowledging that the sentence was in excess of statutory authorization, issued a writ of habeas corpus. As Justice Scalia has written, the opinion

> rested the decision on principles of the common law, and both the Due Process and Double Jeopardy Clauses of the Fifth Amendment . . . . [and] went out of its way *not* to rely exclusively on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving "life or limb." It is clear that

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[16] Story, 3 *Commentaries on the Constitution*, (1833) sec 1781, p. 659 (emphasis added).

[17] *Green v United States*, 355 US 184; 78 S Ct 221; 2 L Ed 2d 199 (1957).

[18] *Ex parte Lange*, 85 US 163; 18 Wall 163; 21 L Ed 872 (1874).

> the Due Process Clause alone suffices to support the decision, since the guarantee of the process provided by the law of the land... assures prior legislative authorization for whatever punishment is imposed.[19]

Seven decades after *Lange* Justice Frankfurter made the point that history confirms that the jeopardy clause is not concerned with multiple punishments, for "legislation ... providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress . . . . It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification."[20]

As Justice Scalia noted in his *Kurth Ranch* dissent, though sometimes referring to a prohibition against multiple punishments, it was not until the decision of *United States v Halper*[21] that the Court ever found improper even a *successive* punishment that had been authorized by the legislature; all cases striking successive punishments had been grounded on the proposition that "[P]rotection against cumulative punishmen[t] is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature."[22] And *Halper* did not long

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[19] *Department of Revenue of Montana v Kurth Ranch,* 511 US 767, 798-799; 114 S Ct 1937, 1955-1956; 128 L Ed 2d 767 (1994) (Scalia, J., dissenting).

[20] *United States ex rel Marcus v Hess,* 317 US 537, 555-556; 63 S Ct 379, 389-390; 87 L Ed 443 (1943) (concurring opinion of Justice Frankfurter).

[21] *United States v Halper,* 490 US 435; 109 S Ct 1892; 104 L Ed 2d 487 (1989).

[22] See e.g. *Ohio v Johnson,* 467 US 493, 498-499; 104 S Ct 2536, 2540; 81 L Ed 2d 425 (1984); *Albernaz v United States,* 450 US 333, 344; 101 S Ct 1137, 1145; 67 L Ed 2d 275 (1981)

survive, being overruled by *Hudson v United States*.[23] There bank officers had been occupationally disbarred and had monetary sanctions imposed by the Office of Comptroller of Currency for their conduct, and were then indicted for misapplication of bank funds. They claimed that under *Halper* the criminal prosecution after the occupational sanctions was a second punishment, barred by the jeopardy clause. The Court promptly jettisoned *Halper*. As Justice Scalia well-summarized the matter in his concurring opinion, in bottling up the genie loosed by the *Halper* decision

> [T]oday's opinion uses a somewhat different bottle than I would, returning the law to its state immediately prior to *Halper* – which acknowledged a constitutional prohibition of multiple punishments *but required successive criminal prosecutions.* So long as that requirement is maintained, our multiple-punishments jurisprudence essentially duplicates what I believe to be the correct double-jeopardy law, and will be as harmless in the future as it was pre-*Halper.* Accordingly, I am pleased to concur.[24]

("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *Whalen v United States,* 445 US 684, 688; 100 S Ct 1432, 1436; 63 L Ed 2d 715 (1980) ("[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized"); *Brown v Ohio,* 432 US 161, 165; 97 S Ct 2221, 2225; 53 L Ed 2d 187 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments").

[23] *Hudson v United States*, 522 US 93; 118 S Ct 488; 139 L Ed 2d 450 (1997).

[24] *Hudson v United States, supra*, 522 US at 106; 118 S Ct at 497 (Scalia, J., concurring). And, as Justice Scalia noted in his *Kurth Ranch* dissent, "It has never been imagined, of course, that the commonplace practice of imposing multiple authorized punishments . . . . after a *single* prosecution is unconstitutional." 511 US at 799-802; 114 S Ct at 1956-1958.

C. Conclusion: The People's Proposed Approach

In short, then, the People submit that it is the Due Process Clause, rather than the Double Jeopardy Clause, that requires that punishment imposed after conviction be within that authorized by the legislature,[25] but the approach is essentially the same no matter where the source of the prohibition is located.[26] Where convictions have been had on multiple counts at one trial, and each offense is a separate offense as understood by *People v Nutt*,[27] then multiple punishments cannot be prohibited by *jeopardy* principles, as jeopardy concerns only the "same" offense, and the offenses

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[25] The notion that Justice Scalia put forth in his dissent in *Kurth Ranch, supra*, that the Double Jeopardy Clause prohibits multiple punishments, "not multiple punishments", and that the source of the protection against "multiple punishments for the same offense," should have been decided solely on due process grounds, thereby avoiding many decades of misinterpretation," has been noted and approved of by other States. *State v Davison,* 263 Wis 2d 145, 162, fn 13; 666 NW2d 1, 9, fn 13 (2003) ("A growing sense that the Court has been on the wrong track may explain its explicit recognition that legislative intent overrides multiple punishments for the same offense."); *Commonwealth v Arriaga,* 44 Mass App 382, 392; 691 NE2d 585, 592 (1998). But see *People v Prince,* 43 Cal App 4th 1174, 1178, fn 4; 51 Cal Rptr 2d 138, 140, fn 4 (1996) ("Until a majority of the United States Supreme Court decides otherwise, we must assume that the Double Jeopardy Clause protects against both successive punishments for the same offense and multiple punishment.").

[26] As the Alaska Supreme Court noted in *Todd v State,* 917 P2d 674, 679, fn 4 (Ala, 1996), "The sequence of the analysis is not important; a court should derive the same result whether it applies the *Blockburger* test and then examines legislative intent or first looks to legislative intent in the hope of obviating the need for further analysis." But, "[e]ven if the crimes are the same under *Blockburger*, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end." *Ohio v Johnson, supra.* As the Wisconsin Supreme Court indicated, "the imposition of cumulative punishments from different statutes in a single prosecution for the 'same offense' violates double jeopardy when the cumulative punishments are not intended by the legislature[,] [whereas] . . . . the imposition of cumulative punishments not authorized by the legislature is a due process violation, not a double jeopardy violation, when the punishments do not spring from the same offense." *State v Davison, supra*, 263 Wis 2d at 164; 666 NW2d at 10.

[27] *Nutt, supra.*

are not the same. But the due process question remains as to whether multiple punishment exceeds the legislative authorization, and where different offenses are involved the rebuttable presumption should arise that the legislature authorized punishment for each. On the other hand, where the offenses are not separate as defined by *Nutt*, then the rebuttable presumption should run the other way, for neither jeopardy nor due process prohibit multiple punishments even for the same offense, so long as the legislature so intended.[28] But finally, the People will argue that with regard to convictions for predicate-based offenses and their predicates, the presumption should be that multiple punishments were intended, for a different approach is mandated in this context.

Argument: Legislative intent is the polestar by which courts must be guided.

"The Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[29] The same is true of the Due Process Clause, as Justice Scalia noted in his dissenting opinion in *Kurth Ranch*, "It is clear that the Due Process Clause alone suffices to support the decision, since the guarantee of the process, provided by the law of the land, [citations omitted], assures prior legislative authorization for whatever punishment is imposed."[30] Whatever clause provides the protection against multiple punishments which are not authorized by a legislature, be it Congress or a state legislature, the focus is upon legislative intent.

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[28] And is readily rebutted where, for example, *consecutive* sentences are permitted or required for the two offenses, as with felony-firearm and the predicate felony, for when the legislature specifically requires or permits cumulative punishment, its intent to so allow could not be clearer.

[29] *Missouri v Hunter,* 459 US 359, 366; 103 S Ct 673, 678; 74 L Ed 2d 535 (1983).

[30] 511 US at 799; 114 S Ct at 1956.

A. The relationship of *Blockburger* to the question of legislative intent

Clearly, as this Court observed in *People v Robideau*,[31] and properly so, this Court is not constrained to follow *Blockburger* in order to determine legislative intent, though it *is*, under *Nutt*, constrained to follow *Blockburger* to determine whether the legislative intent question arises with regard to one offense or multiple offenses. That is because the United States Supreme Court has declared that *Blockburger* is but a test of statutory construction and not a principle of constitutional law when the question is legislative intent.[32] The question now is whether this Court's decision in *Nutt* compels at least consideration of, if not the application of, the *Blockburger* "same elements" test. In other words, the question is whether *Robideau*'s blanket rejection of the *Blockburger* test is still good law in light of *Nutt*. The course that this Court followed in *Nutt*, that is, comparing what Federal law, as interpreted by the United States Supreme Court, was at the time of the ratification of the 1965 Constitution, indicates that *Robideau*'s blanket rejection of *Blockburger* was mistaken – *Blockburger* determines whether one offense or multiple offenses are involved in the legislative intent inquiry.

This Court adopted the *Blockburger* "same elements" test in *Nutt* in the context of consideration of the core of the Double Jeopardy Clause–multiple or successive prosecutions. Whether Michigan should follow a different test for the definition of "same offense" in this context from the federal test where the language of the Federal and State double jeopardy provisions were identical in relevant respects was the question in *Nutt*, raising whether the decision in *People v*

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[31] *People v Robideau,* 419 Mich 458, 486; 355 NW2d 592 (1984).

[32] *Robideau, supra*, 419 Mich at 486.

White,[33] which adopted the "same transaction" test for purposes of successive prosecutions, was consistent with the Michigan Constitution, Const 1963, art 1, §15. Indeed, this Court in *Nutt* posed the question as follows, "In particular, because our Double Jeopardy Clause is essentially identical to its federal counterpart, we must determine whether the term 'same offense' in our Constitution was, in *White*, properly accorded a meaning different from the construction of that term in the federal Constitution."[34] This Court concluded that "at the time of the ratification of our 1963 Constitution, the people of this state intended that the words 'same offense' be construed consistent with state and federal double jeopardy jurisprudence as it then existed."[35]

First, this Court in *Nutt* observed that "at the time of the ratification of the 1963 Constitution, Michigan jurisprudence had defined the scope of our Constitution's double jeopardy protection in reference to the scope of the protection provided by the Fifth Amendment. *People v Bigge*[36] ("[t]his State is committed to the view upon the subject of former jeopardy adopted by the Federal courts under the Federal Constitution"); *People v Schepps*[37] ("this court is now committed to the views [regarding Michigan's double jeopardy protection] adopted by the Federal courts under the United States Constitution").[38] What then was the federal view at the time of the ratification of the 1963 Constitution? This Court in *Nutt* observed that at the time of the ratification of the 1963

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[33] *People v White,* 390 Mich 245; 212 NW2d 222 (1973).

[34] *Nutt, supra*, 469 Mich at 575.

[35] *Id.*

[36] *People v Bigge,* 297 Mich 58, 64; 297 NW 70 (1941).

[37] *People v Schepps,* 231 Mich 260, 265; 203 NW 882 (1925).

[38] *Nutt,* 469 Mich at 581-582.

Constitution, the *Blockburger* "same-elements" test was the well-established method of defining the Fifth Amendment term "same offence."[39] Thus, this Court adopted the *Blockburger* test, and in so doing, overruled its previous decision in *People v White*[40]:

> The *White* Court improperly imposed on the text of art 1, § 15 its own notions of prosecutorial policy and, in so doing, conflated the constitutional double jeopardy protection with a self-created procedural mandatory joinder rule. Because it is clear that the ratifiers of our 1963 Constitution intended to continue to accord the same double jeopardy protection under art 1, § 15 that was provided by the Fifth Amendment, we overrule *White* and its progeny as contrary to the will of the people of the state of Michigan. We hold that the *Blockburger* same-elements test, as the reigning test in both this Court and the federal courts in 1963, best gives effect to the will of the people in ratifying art. 1, § 15.[41]

That which led this Court to adopt *Blockburger* as the test to be applied in the context of successive prosecutions, then, was that that test was being applied by the United States Supreme Court to successive prosecutions before, and at the time of, the ratification of our 1963 Constitution. This poses this question: was the United States Supreme Court applying the *Blockburger* "same elements" test to multiple punishments as a matter of double jeopardy analysis prior to 1963? The answer is that it was.

In *Gore v United States,*[42] the issue in controversy was the legality of the sentences imposed by the trial court on a six-count narcotics prosecution; the trial court had imposed a term of

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[39] *Nutt,* 469 Mich at 575.

[40] *People v White,* 390 Mich 245; 212 NW2d 222 (1973)

[41] *Nutt,* 469 Mich at 596.

[42] *Gore v United States,* 357 US 386; 78 S Ct 1280; 2 L Ed 2d 1405 (1958).

imprisonment for a term of one to five years on each count, the sentences on the first three counts to be served consecutively and the sentences on the remaining three counts to be served. There, the Court stated:

> We adhere to the decision in *Blockburger v United States, supra.* The considerations advanced in support of the vigorous attack against it have left its justification undisturbed, nor have our later decisions generated counter currents.[43]

See also *Harris v United States.*[44] Thus, for the reasons given by this Court in *Nutt* for adopting the *Blockburger* test for the successive prosecutions component of double jeopardy, *Blockburger* should be adopted as the test for defining whether involved is the same or multiple offenses for the

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[43] *Gore, supra*, 357 US at 388; 78 S Ct at 1282.

[44] *Harris v United States,* 359 US 19; 79 S Ct 560; 3 L Ed 2d 597 (1959).

multiple punishments component of double jeopardy.[45] [46] Thus, *Robideau*'s blanket rejection of *Blockburger* was wrong.[47] [48]

What *Blockburger* clearly does is resolve the question of whether the Double Jeopardy Clause is even involved. Indeed, if two separate statutory offenses pass the *Blockburger* test, there simply *is no* double jeopardy violation, for, the offenses *not* being the same, multiple punishments cannot violate jeopardy. All that remains is to determine legislative intent, because even if multiple

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[45] This assumes, of course, that multiple punishments is a component of the Double Jeopardy Clause, and not just as an implication of the Due Process Clause.

[46] In *Brown v Ohio, supra*, 432 US at 166; 97 S Ct at 2226, the Supreme Court noted that if two offenses are the same under the *Blockburger* test for purposes of multiple punishments at a single trial, they will necessarily be the same for purposes of barring successive prosecutions. The opposite, it seems, would also be true: if two offenses are different under the *Blockburger* test for purposes of successive prosecutions, they necessarily will be different for purposes of multiple punishments.

[47] The People are not, however, asking this Court to overrule *Robideau*, since the majority did arrive at the right result, and also because the majority did apply guiding principles of statutory construction which should be considered even when the *Blockburger* test is applied, as will be argued infra.

[48] Of course, if this Court were to adopt Justice Scalia's opinion that "multiple punishments" is not a component of double jeopardy at all, this Court's *Nutt* decision would not compel adoption of the *Blockburger* test. Indeed, in his dissent in *Kurth Ranch*, Justice Scalia implicitly acknowledged that the double jeopardy protection against multiple punishments was not coextensive with the *Blockburger* test. He wrote, "Thus in the context of criminal proceedings, legislative authorized multiple punishments are permissible if imposed in a single proceeding, but impermissible if imposed in successive proceedings." These observations were made by the Texas Court of Appeals in *McDuff v State,* 943 SW2d 517, 525, fn 6 (Tex App, 1997). What the Texas Court was pondering was whether *United States v Dixon,* 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993), had overruled *Missouri v Hunter,* supra, the Court noting that there was some language in *Dixon*, 509 US at 696; 113 S Ct at 2856, that might be indicative of only a unitary test based on *Blockburger* for determining whether two offenses are the same offense for double jeopardy purposes. The Court opined that this was not the case because of what Justice Scalia, the author of the lead opinion in *Dixon*, said in his dissent in *Kurth Ranch.*

punishments do pass the *Blockburger* test, they still violate due process if multiple punishments were *not* intended by the relevant legislative body.[49] On the other hand, if the *Blockburger* test reveals that a single offense is involved, multiple punishments are nonetheless permitted, that is, they are not constitutionally barred, if that was the legislative intent, as the Court made clear in *Missouri v Hunter*, for the legislature may provide for multiple punishments for one offense[50] (and often does, as in a fine and incarceration). Thus, as can be seen, legislative intent is the polestar by which the courts must be guided. And, in the end, *Blockburger,* while a constitutional rule for determining whether a single offense or multiple offenses are involved, is a rule of statutory construction on the ultimate question of legislative intent.[51] It is necessarily the first step in a court's analysis in that it creates a presumption, one way or another, as to the actual legislative intent,[52] but it is not a blind

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[49] See e.g. *State v Davison, supra*, 263 Wis 2d at 164; 666 NW2d at 10 ("The imposition of cumulative punishments not authorized by the legislature is a due process violation, not a double jeopardy violation, when the punishments do not spring from the same offense.").

[50] *Missouri v Hunter, supra.*

[51] *Missouri v Hunter, supra*, 459 US at 367; 103 S Ct at 679; *Albernaz v United States, supra*, 450 US at 340; 101 S Ct at 1142.

[52] The presumption is a rebuttable one. If under *Blockburger*, the offenses are the same, multiple punishments are not permitted in the absence of a clear indication of contrary legislative intent. *Missouri v Hunter, supra*, 459 US at 366-367; 103 S Ct at 678, citing to and quoting from *Whalen v United States, supra*, 445 US at 691-692; 100 S Ct at 1437-1438. On the other hand, if each offense requires proof of a fact that the other does not, multiple punishments are presumed to be authorized, in the absence of a contrary legislative intent. *Carawan v State,* 515 So 2d 161, 168 (Fla, 1987).

The People recognize that just as it is still appropriate to go beyond *Blockburger* when that test discloses that the two offenses are the same, it is also appropriate to go beyond *Blockburger* when that test discloses that the two offenses are different. *State v Delgado,* 19 Conn App 245, 252-254; 562 A2d 539, 543 (1989).

presumption that may be applied without regard to other relevant evidence of the legislative intent.[53] Furthermore, as Justice Boyle observed in *People v Wakeford*,[54] because *Blockburger* is nothing more than a rule of statutory construction with regard to the legislative intent question, it should not be applied where it is not helpful, for as this Court has noted, the primary purpose of statutory construction is to ascertain and give effect to the intention of the Legislature, and the rules of construction established by the courts over the years serve but as guides to assist the courts in determining such intent with a greater degree of certainty.[55]

B. *Blockburger* and the question of predicate-based offenses and their predicate offenses

Blockburger is, in fact, *not* helpful in discerning legislative intent when it is applied to *predicate and predicate-based offenses*. In his dissent in *Whalen*, Justice Rehnquist explained why:

> Second, the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses. Strictly speaking, two crimes do not stand in the relationship of greater and lesser included offenses unless proof of the greater necessarily entails proof of the lesser. See *Brown v Ohio*, 432 US at 167-168; 97 S Ct at 2226. See also Black's Law Dictionary 1048 (rev 4th ed 1968). In the case of assault and assault with a deadly weapon, proof of the latter offense will always entail proof of the former offense, and this relationship holds true regardless whether one examines the offenses in the abstract or in the context of a particular criminal transaction.

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[53] *Carawan v State, supra*, 515 So 2d at 167; *State v Delgado, supra*, 19 Conn App at 252; 562 A2d at 543.

[54] *Wakeford, supra*, 418 Mich at 107.

[55] *Browder v International Fidelity Insurance Company*, 413 Mich 603, 611; 321 NW2d 668 (1982).

> On the other hand, two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present. To cite one example, 18 U.S.C. §§ 924(c)(1) states that "[w]hoever . . . uses a firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years." Clearly, any one of a plethora of felonies could serve as the predicate for a violation of §§ 924(c)(1).
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> This multiplicity of predicates creates problems when one attempts to apply *Blockburger*. If one applies the test in the abstract by looking solely to the wording of §§ 924(c)(1) and the *statutes defining* the various predicate felonies, *Blockburger* would always permit imposition of cumulative sentences, since no particular felony is ever "necessarily included" within a violation of §§ 924(c)(1). If, on the other hand, one looks to the *facts alleged in a particular indictment* brought under §§ 924(c)(1), then *Blockburger* would bar cumulative punishments for violating §§ 924(c)(1) and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.[56]
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> . . . . *when applied to compound and predicate offenses, the* Blockburger *test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties. Cf n 6, supra. If the polestar in this case is to be legislative intent, I see no reason to apply* Blockburger *unless it advances that inquiry.*[57]

It was this rationale, that depending upon how *Blockburger* is applied, that is, whether it is applied in the abstract by looking solely to the wording of the predicate-based statute and the statutes

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[56] *Whalen, supra*, 445 US at 708-709; 100 S Ct at 1146-1147.

[57] *Whalen, supra*, 445 US at 712; 100 S Ct at 1448. (Emphasis in original).

defining the various predicate felonies, or whether it is applied by looking at the actual facts alleged in a particular charging instrument indictment, the result will always be the same, that led to this Court's outright rejection of *Blockburger* in *Robideau,* observing that while *Blockburger*'s "creation of a presumption may make a court's task easier, it may induce a court to avoid difficult questions of legislative intent in favor of the wooden application of a simplistic test."[58] [59]

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[58] *Robideau, supra*, 419 Mich at 486.

[59] The People believe that an argument could be made that *Blockburger* should be applied in the abstract for the reasons given by Justice Rehniquest, in his dissent in *Whalen*, and that the majority decision in *Whalen* does not preclude this Court from doing just that. First, here's what Justice Rehnquist said:

> Because this Court has never been forced to apply *Blockburger* in the context of compound and predicate offenses, we have not had to decide whether *Blockburger* should be applied abstractly to the statutes in question or specifically to the indictment as framed in a particular case. Our past decisions seem to have assumed, however, that *Blockburger* 's analysis stands or falls on the wording of the statutes alone. Thus, in *Blockburger* itself the Court stated that "The applicable rule is that where the same act or transaction constitutes a violation of two distinct *statutory provisions,* the test to be applied to determine whether there are two offenses or only one is whether each *provision* requires proof of a fact which the other does not." 284 US at 304; 52 S Ct at 182 (emphasis added). More recently, we framed the test as whether " 'each *statute* requires proof of an additional fact which the other does not. . . ." *Brown v Ohio, supra,* at 166; 97 S Ct at 2226 quoting *Morey v. Commonwealth,* 108 Mass. 433, 434 (1871) (emphasis added). See also *Iannelli v. United States*, 420 US at 785, n 17; 95 S Ct at 1294 n 17 ("[T]he Court's application of the *[Blockburger]* test focuses on the statutory elements of the offense"); M. Friedland, Double Jeopardy 212-213 (1969) (noting the two possible interpretations and pointing out that "the word 'provision' is specifically used in the test" as stated in *Blockburger*). Moreover, because the

Justice Ryan also noted in his concurring opinion in *Wilder* that traditional lesser included offense analysis, for purposes of determining legislative intent as to multiple punishments, was actually not probative of legislative intent when dealing with predicate and predicate-based offenses.[60] [61] This was so, he said, because "[t]he concept of included offenses reflects a continuum

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> *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment.
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> 445 US at 710-710; 100 S Ct at 1147-1148.

Because the *Blockburger* test is a rule of statutory construction, and is not a constitutional rule, so that state courts are not obliged to follow it in determining the legislative intent of a state legislature as to multiple punishments, a state should, it seems, be at liberty, to apply *Blockburger* as it sees fit. What must be remembered, after all, is that the Supreme Court was interpreting the legislative intent of laws enacted by Congress for the governance of the District of Columbia, and so, was, in effect, sitting as any other state supreme court would in determining the legislative intent of a state's legislature; the point is that the Supreme Court in *Whalen* was not laying down a constitutional rule. On the other hand, it might seem rather disingenuous to disregard the majority opinion (*Whalen*) of the very court that formulated the *Blockburger* test. But what should also be noted is that at the time of the ratification of our 1963 Constitution, the United States Supreme Court had not yet decided *Whalen, supra*, and so, had not yet held that *Blockburger* was not be applied in the abstract. Again, the focus in *Nutt* was what the state of the law was at the time of the ratification of the 1963 Constitution.

[60] *Wilder, supra*, 411 Mich at 358-364.

[61] A lesser included offense analysis, that is, a necessarily lesser included offense, as that term is defined in this Court's opinion in *People v Mendoza,* 468 Mich 527, 532, fn 3; 664 NW2d 685 (2003) (necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense), is really the same as the *Blockburger* test, except that the giving of a necessarily included offense is determined by the evidence that comes out at the trial, see e.g. *People v Cornell,* 466 Mich 335, 357; 646 NW2d 127 (2002) ("a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of he evidence would support it."), which is not what the *Blockburger* test focuses on, see *Illinois v Vitale,* 447 US 410, 416; 100 S Ct 2260, 2265; 65 L Ed 2d 228 (1980) ("the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial.").

of culpability, that is, that "[o]ffenses lie on the same continuum, and are therefore greater and lesser included offenses, when 'the elements shared by the two offenses coincide in the harm to the societal interest to be protected.' "[62] Justice Ryan wrote:

> In our cases that have used the lesser included offense test, the implicit assumption has been that, for committing a single criminal act, the Legislature did not intend a person to be convicted of and punished for two or more offenses lying on a single continuum of culpability. This is because each continuum comprises those offenses that serve to vindicate the same social norm. Thus, if one commits a criminal act that violates a single social norm, conviction of and punishment for a single offense would seem to vindicate the interests infringed by that act.[63]

Coincidentally, Justice Rehnquist made a similar observation in his dissent in *Whalen*:

> Indeed, the *Blockburger* test itself could be viewed as nothing but a rough proxy for such analysis, since, by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.[64]

Apart from the fact that the prosecution could always pass the *Blockburger* test in the case of predicate and predicate-based offenses if the two statutes involved are viewed in the abstract, to illustrate that *Blockburger* is really not helpful, even if the indictment is the focus, is that the prosecution could charge a defendant with felony murder with the underlying felony being larceny and also a separate count of armed robbery, so as to satisfy the *Blockburger* test simply through the

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[62] *Wilder, supra*, 411 Mich at 360.

[63] *Wilder, supra*, 411 Mich at 360-361.

[64] *Whalen, supra*, 445 US at 713-714; 100 S Ct at 1449.

manner of charging.[65] Again, under *Blockburger*, "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not."[66] Under the proposed charging scenario, the prosecution would, for the count of felony murder, be required to prove a murder committed during the perpetration of or the attempt to perpetrate a larceny; thus, the proofs would require the showing of a murder, an element not contained in armed robbery. To sustain the armed robbery count, the prosecution would have to prove the commission of an armed robbery, i.e. a forceful taking while armed. This offense has an element not contained in the charge of felony murder with the underlying felony being larceny, that being a *forceful* taking *while armed.* In other words, it would not be necessary for all of the ingredients of armed robbery to be proved in order to prove felony murder, and so, the *Blockburger* test would be satisfied. Of course, the manner of charging does nothing in the quest to determine legislative intent.

In sum, *Blockburger* should not be employed as a tool to discern if the legislature intended the imposition of multiple punishments for two offenses arising out of one trial where the two offenses are a predicate offense and a predicate-based offense.

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[65] In this case, Defendant was charged with first-degree felony murder with the underlying felony being armed robbery or larceny and also with a separate count of armed robbery.

[66] *Blockburger,* 284 US at 304; 52 S Ct at 182; *Brown v Ohio, supra,* 432 US at 166; 97 S Ct at 2225.

If the *Blockburger* test should not be a part of the analysis to discern legislative intent where predicate-based offenses and their predicates are involved, what test or tests should be employed?[67]

The majority in *Robideau* noted and applied two principles to discern legislative intent. One looked at the social harm that each offense addresses:

> Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments.[68]

Another source of legislative intent, the majority in *Robideau* observed, is the amount of punishment expressly authorized by the Legislature.[69]

In *Robideau*, the two offenses were first-degree criminal sexual conduct (penetration under circumstances involving any "other felony") and the underlying felony of either armed robbery or kidnapping. The majority held, applying the two above principles of legislative intent, that the Legislature had intended that there be multiple punishments, that is, a separate conviction and sentence for each. The Court found this to be the case because the two offenses clearly addressed

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[67] One might ask why the Legislature simply doesn't make its intention plain by expressly stating that a person convicted of both a predicate-based offense and a predicate offense shall be sentenced for both or not sentenced for both. The Florida Supreme Court, in *Carawan v State, supra*, 515 So 2d at 165, answered this question: "Unfortunately, comprehensive statements of Intent are rare because of our increasingly complex criminal codes which are constantly being changed, modified, and amended, not under thoughtful masterplan, but in piecemeal fashion."

[68] *Robideau, supra*, 419 Mich at 487.

[69] *Robideau, supra*, 419 Mich at 487.

different social harms and because the authorized sentence for each was a maximum of life imprisonment, co-equal penalties in other words.

In *People v Harding*,[70] this Court had occasion to employ the same principles in addressing the question of whether multiple punishments should ensue for the offenses of first-degree felony murder and armed robbery. Justice Brickley, writing for the majority, held that unlike the offenses involved in *Robideau*, which had the same possible penalties, statutory felony murder, which carried a penalty of mandatory life without parole, was greater than the penalty for armed robbery, the predicate offense, and so, it could be inferred that the Legislature did not intend the imposition of punishments for both crimes.[71] What was rather conspicuously absent from the analysis, however, was a discussion of the social harms the two offenses were designed to address. Justice Riley did address this in her concurring/dissenting opinion in *Harding*. She observed:

> Thus, first-degree murder focuses upon homicide, armed robbery upon the violent deprivation of property. The first-degree murder statute does not punish the taking of property except when accompanied by a homicide. Nor does the armed robbery statute punish homicide. The societal interests are independent. In fact, the societal interests targeted by the felony murder provision of the first-degree murder statute generally are distinct from the underlying felonies. Felony murder is designed to punish homicide committed in the course of aggravated circumstances, while the societal interests undergirding the enumerated felonies are independent and also important to maintain. That the societal interests in prohibiting rape and kidnapping, for instance, are distinct from those prohibiting murder cannot be doubted. In a parallel fashion, the societal interests served by armed robbery and the first-degree murder statutes are distinct. [Footnote omited].

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[70] *People v Harding,* 443 Mich 693; 506 NW2d 482 (1993).

[71] *Harding, supra*, 443 Mich at 709-712.

> This is especially true in Michigan where felony murder requires malice. *People v Aaron,* 409 Mich 672, 728; 299 NW2d 304 (1980). The societal interest in prohibiting first-degree murder is not only homicide, but one committed with malice. *Id.* Armed robbery, of course, does not possess such a requirement. "[T]he presence of the different intent elements indicates that the Legislature intended to prevent distinct types of harm, robbery and corporal harm," as well as intended to address separate social ills. *People v Smith,* 152 Mich App 756, 761; 394 NW2d 94 (1986) (holding that multiple punishments were intended with regard to assault with intent to do great bodily harm and assault with intent to rob and steal while armed). See also *People v Leach,* 114 Mich App 732, 735-736; 319 NW2d 652 (1982) (holding that multiple punishments were intended with regard to armed robbery and assault with intent to commit great bodily harm). The Legislature carefully crafted distinct offenses defending separate societal interests that defendants violated. Punishment for each offense was intended by the Legislature.[72]

Other states have made the same observation in arriving at the conclusion that multiple punishments were intended.[73] And, Justice Ryan noted this in his concurring opinion in *Wilder* as well.[74]

Where Justice Riley's opinion expressly parted company with Justice Brickley's opinion in *Harding* was in the analysis of the comparative sentences as evidencing legislative intent. Justice Brickley opined that the fact that statutory felony murder based on the predicate crime of armed robbery carried with it a greater penalty than the predicate crime was evidence that the Legislature did not intend to impose punishments for both crimes.[75] Justice Brickley explained that this was why the result in *Robideau* squared with the result in *Wilder*, because a person in the process of

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[72] *Harding, supra*, 443 Mich at 732-733.

[73] See *Todd v State, supra*, 917 P2d at 680; *State v Greco,* 219 Conn 282, 296; 579 A2d 84, 91 (1990).

[74] *Wilder, supra*, 411 Mich at 364.

[75] *Harding, supra*, 443 Mich at 712.

committing an armed robbery has a real disincentive to commit murder (for the offense would then be felony murder subjecting him to life without parole), and this would be true even without the threat of dual convictions/punishments, whereas that same person committing armed robbery would have no disincentive to also commit a criminal sexual conduct on the victim, if he was so inclined, if he could not be convicted and punished for both.[76] Justice Riley, in her concurring opinion, felt that the majority opinion incorrectly dismissed the fact that the maximum authorized penalty for armed robbery was life imprisonment, because a felon convicted of armed robbery could very well serve a full sentence.[77] She called the distinction between life without the possibility of parole (the penalty for felony murder) and life with the possibility of parole (an authorized punishment for armed robbery) a minor one, which did not, as the majority opined, reveal a legislative intent to subsume the punishment for armed robbery into the punishment for felony murder.[78] This was especially true, she said, in light of the fact that the societal interests of each offense were disparate.[79] While reasonable minds may differ as to the accuracy of Justice Riley's characterization of the difference between life without the possibility of parole and life with the possibility of parole as being a minor distinction (it seems that there is a rather significant difference between a sentence that leaves a felon with some hope of parole and one that leaves him with no hope), what she said in another part of her opinion, which is actually a quote from *People v Wakeford*,[80] is highly persuasive:

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[76] *Harding, supra*, 443 Mich at 711, citing *Robideau*, 419 Mich at 489, fn 8.

[77] *Harding, supra*, 443 Mich at 730, fn 23.

[78] *Id.*

[79] *Id.*

[80] *Wakeford, supra.*

> We have never held, as a matter of state or federal constitutional law, that only one conviction may result, for example, from the rape, robbery, kidnapping, and murder of victim A . . . . even if the charges must be brought in a single trial under the "same transaction" test. Such a rule could be said to permit criminals to engage in an extended crime "spree," knowing that at most only one conviction could result and that any crime other than the most serious was "free" of any possibility of conviction. It would offend rationality, as well as our sense of equal justice, to require treatment of one defendant committing a single crime identically with another defendant committing four counts of the same crime in the "same transaction."[81]

Justice Riley observed that the majority's dismissal of the armed robbery conviction presented the very danger that *Wakeford* forewarned of, that a felon could engage in a crime spree, knowing that at most only one conviction could result and that any other crime other than the most serious would be free of any possibility of conviction.[82]

On the subject of comparing the prescribed sentences for the predicate-based offense and the predicate offense for purposes of discerning legislative intent, at least one court has observed that where the penalty for the predicate-based offense stands alone and is not based on a multiplier of the penalty for the predicate offense, this is indicative of a legislative intent that multiple punishments be imposed.[83] That is, of course, the case with the two offenses involved here.

In *Robideau*, the majority opinion also made clear that the principles of legislative intent it had applied, that is, comparing the social harms the two offenses were meant to address and

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[81] *Harding, supra*, 443 Mich at 733-734, citing to and quoting from *Wakeford*, 418 Mich at 105, fn 7.

[82] *Harding*, 443 Mich at 734.

[83] *Greco, supra*, 216 Conn at 294; 579 A2d at 90.

comparing the amount of punishment authorized for each offense, were not the exclusive means by which to discern legislative intent.[84]

Other evidence that the Legislature did intend multiple punishments for felony murder and the underlying felony is found in the Legislature's sentencing policy itself. As this Court stated in *Wakeford*, "Our legislatively expressed state policy requiring concurrent rather consecutive sentencing in the absence of specific legislative authorization avoids the principal harshness that might otherwise result from multiple convictions."[85] It could be inferred that because the Legislature has provided for concurrent sentences for multiple offenses in a single trial, it intended there to be a conviction and sentence for each offense of which a felon is guilty, and that where the felon would get a break is in the sentences running concurrently.

Another tenet of statutory construction, as this Court has observed, is that statutes are to be construed to avoid absurd results.[86] And, as the United States Supreme Court stated, "[t]o construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts."[87] As pertains to multiple punishments, where the offenses involved are felony murder and an underlying felony, one court has

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[84] *Robideau*, 419 Mich at 488.

[85] *Wakeford,* 418 Mich at 113.

[86] *Gardner v Van Buren Schools,* 445 Mich 23, 43; 517 NW2d 1 (1994).

[87] *Sorrells v United States,* 287 US 435, 450; 53 S Ct 210, 216; 77 L Ed 413 (1932).

noted the absurdity of allowing two convictions if the injured victim lives, but allowing only one conviction if the victim dies.[88]

Another example of an incongruous result is where a defendant points a gun at one victim, intending to rob that victim, and does rob that victim, and then discharges the gun, intending to kill the robbery victim, but instead killing a person standing near the victim. In that case, it would seem rather clear that a conviction and sentence for both felony murder and armed robbery could stand, even though there would really only be one "unit of prosecution," because the defendant had intended to rob and kill one victim.[89] That is not the case under current law, however, where the robbery victim and the murder victim are one and the same person.[90]

C. *Wilder* should be overruled.

In the end, the question is whether this Court's *Wilder* decision should be re-examined, as Justice Corrigan opined it should be, in her concurring opinion in *People v Colvin*,[91] and whether it should in fact be overruled.[92] It should.

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[88] *State v Gonzales,* 245 Kan 691, 705; 783 P2d 1239, 1248 (1989), cited for that proposition in *Todd v State,* 884 P2d 668, 680 (Ala App,1995), *aff'd* 917 P2d 674 (1996), *cert den sub nom Todd v Alaska,* 519 US 966; 117 S Ct 391; 136 L Ed 2d 306 (1996).

[89] *Wakeford, supra*, 418 Mich at 112-113.

[90] This was an incongruity noted by the Alaska Court of Appeals in *Todd v State, supra*, 884 P2d at 684.

[91] *People v Colvin,* 467 Mich 944; 655 NW2d 764 (2003) (Corrigan, C.J., concurring).

[92] This is assuming that that part of the *Wilder* majority opinion that addresses multiple punishments is not just obiter dictum, but judicial dictum. Indeed, in *Wilder*, the majority, before it addressed the question of multiple punishments, had already decided that the trial court had given erroneous instructions in light of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), which necessitated vacating the first-degree felony murder with the option given to the prosecuting authority to retry the defendant on the first-degree murder charge:

i. *Wilder* Majority Opinion

As Justice Corrigan noted, first, in *Colvin*, the analysis in *Wilder* deserves scrutiny. This seems clear inasmuch as the basis for the majority's holding was in its determination that "the proper focus of double jeopardy inquiry in this area [is] . . . the proof of facts adduced at trial rather than the theoretical elements of the offense alone."[93] This statement goes well beyond what the United States Supreme Court has stated, however; see *Illinois v Vitale* ("the *Blockburger* test focuses

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> In this context, the improper instructions relating to the felony-murder charge cast no doubt upon the validity of the armed robbery conviction. As the conviction of the greater offense of first-degree felony-murder is vacated, it is no longer a double jeopardy violation to allow the conviction of the lesser offense, armed robbery, to stand. (Footnote continues on next page).
>
> Accordingly, we reinstate the conviction of the lesser offense of armed robbery and remand to the trial court. If the prosecuting attorney is persuaded that the ends of justice would be better served by retrial for first-degree felony-murder, he may so advise the trial court and the conviction of armed robbery shall also be vacated and a new trial on both charges may be conducted in conformity with this opinion. 411 Mich 352-353.

As can be seen, then, the majority's opinion regarding multiple punishments was dictum. The question is whether that dictum is binding. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but *obiter dicta* and lack the force of an adjudication. *Hett v Duffy,* 346 Mich 456, 461; 78 NW2d 284 (1956). If what the majority said in *Wilder* regarding multiple punishments was simply obiter dictum, this Court would need do no more than repudiate it, if it disagrees with the *Wilder* majority opinion regarding multiple punishments. If, on the other hand, this Court is of the opinion that the dictum in *Wilder* was judicial dictum, which is arguably as binding as the precise holding of the case, Am Jur 2d, §§ 603, p 299; cf *Johnson v White,* 430 Mich 47, 55, fn 2; 420 NW2d 87 (1988) (observing that "unlike obiter dicta, judicial dicta are not excluded from applicability of the doctrine of the law of the case"), this Court would have to overrule it, if in disagreement with it.

[93] *Colvin*, citing *Wilder, supra*, 411 Mich at 349, fn 10.

on the proof necessary to prove the statutory elements of each offense, *rather than on the actual evidence to be presented at trial.*").[94] Furthermore, the *Wilder* majority opinion undertook none of the analysis that this Court did in *Robideau* in determining the legislative intent, i.e. whether the two offenses address the same or different social evils, and the comparative severity of the sentences authorized by the Legislature for each. Of course, as noted previously, this Court in *Robideau* did state that its analysis as far as comparing the severity of the sentences to determine legislative intent as to multiple punishments squared with the result reached in *Wilder*,[95] thus explaining how *Wilder* could stand after *Robideau*. The fact is, however, that *Wilder* did not engage in this analysis. Finally, as Justice Corrigan also noted in *Colvin*, the *Wilder* decision also based its decision on lesser included offense analysis, which took into consideration not only necessarily lesser included offenses but cognate lesser offenses, "we have held that double jeopardy claims under our constitution may prohibit multiple convictions involving cognate as well as necessarily included offenses."[96] As Justice Corrigan aptly noted, this Court's decision in *People v Cornell*[97] is simply inconsistent with *Wilder* as far as *Wilder*'s reliance on cognate lesser offenses as constituting the "same offense."

Inasmuch as the *Wilder* majority opinion is based on unsound foundations, and because application of appropriate principles to discern legislative intent, primarily looking at the different

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[94] *Illinois v Vitale, supra*, 447 US at 416; 100 S Ct at 2265 (Emphasis added).

[95] *Robideau, supra*, 419 Mich at 489, fn 8.

[96] *Colvin, supra*, citing to and quoting from *Wilder, supra*, 411 Mich at 349, fn 10. The majority in Wilder also wrote, "Where the proof adduced at trial indicates that one offense is a necessarily or cognate lesser offense of the other, then conviction of both offenses will be precluded." *Wilder, supra*, 411 Mich at 343-344.

[97] *Cornell, supra.*

social harms that the first-degree felony murder statute and the armed robbery statute are designed to address, weighs in favor of a determination that the Legislature did intend multiple convictions and sentences, *Wilder* should be overruled.

ii. *Wilder* Concurring Opinion

The question remains whether Justice Ryan's concurring opinion, in which Justice Ryan found that a felony murder transaction involves violation of distinct social norms, which raises an inference that the Legislature did intend to impose multiple punishment, should, instead, be followed. Quite clearly, Justice Ryan applied, and rightly so, the *Robideau* principle that looks at the social harms each statute is meant to address.[98] Nevertheless, Justice Ryan held that this was not enough "to overcome what is in effect the rebuttable presumption against multiple punishment contained in the Double Jeopardy Clause, which works as a particularized version of the rule of lenity."[99]

The problem with Justice Ryan's opinion is that it purports to apply *Blockburger*, the application of which creates a "rebuttable presumption," without actually applying *Blockburger*. In other words, it is not explained where the rebuttable presumption against multiple punishments comes from. Actually, Justice Ryan's statement that there is a rebuttable presumption against multiple punishments directly conflicts with what the United States Supreme Court stated in *Garrett v United States*: "The presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences, and legislative silence on this specific issue does not establish an

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[98] *Wilder, supra*, 411 Mich at 364.

[99] *Id.*

ambiguity or rebut this presumption."[100] In other words, there is a presumption, but it goes in the opposite direction than the one Justice Ryan stated.

Thus, there is no reason to follow Justice Ryan's opinion either. Inasmuch as Justice Ryan does seem to invoke the rule of lenity, the People should address, before closing, whether that rule should apply.

iii. The rule of lenity should not apply.

In *Wakeford*, this Court stated that "[t]he rule of lenity properly applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent."[101] In so stating, Justice Ryan, writing for the majority, cited the United States Supreme Court opinion of *Albernaz v United States*,[102] and to his own concurring opinion in *Wilder*,[103] which in turn also cited United States Supreme Court case law.[104]

Since the decisions in *Wakeford* and *Wilder*, the United States Supreme Court has made other pronouncements regarding the rule of lenity. The rule of lenity, the Court has said, is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the [statute], such that even after the court has seized everything from which aid can be derived, it is still left with an

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[100] *Garrett v United States,* 471 US 773, 793; 105 S Ct 2407, 2419; 85 L Ed 2d 764 (1985).

[101] *Wakeford, supra*, 418 Mich at 113-114.

[102] *Albernaz v United States, supra*, 450 US at 342-343; 101 S Ct at 1144.

[103] *Wakeford, supra*, 418 Mich at 114, fn 18.

[104] *Wilder, supra*, 411 Mich at 364-365, citing *Ladner v United States,* 358 US 169, 178; 79 S Ct 209, 214; 3 L Ed 2d 199 (1958).

ambiguous statute;[105] stated differently, the rule of lenity applies if the Court can "make no more than a guess as to what Congress intended."[106] The rule of lenity comes into operation at the end of the process of construing what the Legislature has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.[107] Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved.[108] Finally, the mere possibility of articulating a narrower construction does not by itself make the rule of lenity applicable.[109]

In the preceding portions of this Brief, the People noted that in *Harding* were seen two competing reasons given in arriving at different results regarding multiple punishments in the context of predicate-based offenses and predicate offenses. Indeed, Justice Brickley gave as a reason for his arriving at the conclusion that the Legislature did not intend multiple punishments for felony murder and armed robbery the comparative sentences authorized by the Legislature for each offense, and how the penalty for felony murder was greater than that for armed robbery. And Justice Riley gave a reason which competed with the reason given by Justice Brickley in arriving at her conclusion that multiple punishments were intended. The reason she gave was the distinction between the social harms which each statute was meant to address. And clearly, the social harms

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[105] *Chapman v United States,* 500 US 453, 463; 111 S Ct 1919, 1926; 114 L Ed 2d 524 (1991).

[106] *United States v Wells,* 519 US 482, 499; 117 S Ct 921, 931; 137 L Ed 2d 107 (1997), quoting from *Reno v Koray,* 515 US 50, 65; 115 S Ct 2021, 2029; 132 L Ed 2d 46 (1995).

[107] *Chapman, supra,* 500 US at 463; 111 S Ct at 1926.

[108] *Johnson v United States,* 529 US 694, 713, fn 13; 120 S Ct 1795, 1807, fn 13; 146 L Ed 2d 727 (2000).

[109] *Smith v United States,* 508 US 223, 239; 113 S Ct 2050, 2059; 124 L Ed 2d 138 (1993).

are distinct, as Justice Riley noted in her concurring opinion in *Harding*,[110] and as Justice Ryan noted in his concurring opinion in *Wilder*, [111] and as other states have observed in arriving at the conclusion that multiple punishments were intended.[112]

So, the question is, for purposes of whether the rule of lenity should have any application, is whether the competing reasons given by Justices Brickley and Riley, in their various opinions in *Harding*, are in a state of equipoise. The People submit that when balancing the two reasons or considerations, the one that takes into account the different social harms addressed by the two offenses should carry greater weight than the one taking into account the comparative sentences. The former consideration was the first even addressed in *Robideau*, making it essentially the primary consideration, and it is the reason that other courts have routinely given in arriving at the conclusion that multiple punishments are intended. Thus, the two competing considerations are not in equipoise.

Conclusion/Summary

- The phrase "same offense" in the double jeopardy protection should be defined identically whether the jeopardy question is one of successive prosecutions or multiple punishments (and, properly understood, there is no double jeopardy multiple punishment issue).

- When different offenses are involved, on application of the *Blockburger/Nutt* elements test, punishment for each offense *cannot* violate the double jeopardy protection, but if the legislature intended imposition of only one penalty, a sentence that exceeds the legislative authorization violates due process. That the offenses are different

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[110] *Harding, supra*, 443 Mich at 731-733.

[111] *Wilder, supra*, 411 Mich at 364.

[112] *Todd v State,* 917 P2d at 680; *State v Greco,* 219 Conn at 296; 579 A2d at 91.

raises a rebuttable presumption (or should) that multiple punishment was intended.

- When different offenses are *not* involved, on application of the *Blockburger/Nutt* elements test, punishment for each conviction only violates the jeopardy protection (and the People submit this is better understood as a due process question) if the legislature intended only one punishment. That the offenses are not different raises a rebuttable presumption (or should) that multiple punishment was not intended.

- Predicate-based offenses and their predicate offenses require a different analysis, however, as they are "legislatively related" rather than "logically related." Either the elements test should be applied abstractly to create a rebuttable presumption in favor of multiple punishment, or, as the preferred analysis, the fact that distinct social harms are protected by the two statutes should create a rebuttable presumption in favor of multiple punishment.

Relief

Wherefore, the People respectfully request that this Honorable Court reverse the Opinion of the Court of Appeals which vacated Defendant's conviction and sentence for armed robbery.

Respectfully submitted,

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